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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1546

HAROLD FINKLE,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

HAROLD FINKLE petitions for a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey (App., p. A2), reported at 66 N. J. 139, 329 A. 2d 65, as follows:

> "Per Curiam: The judgment is affirmed substantially for the reasons expressed by the Appellate Division."

The Supreme Court of New Jersey had previously granted certification to review the judgment of the Appellate Division of the Superior Court (App., pp. A5-A16) reported at 128 N. J. Super. 199, 319 A. 2d 733. The oral decision of the Atlantic County Court is set forth at p. A17 of the Appendix, and the oral decision of the Folsom Municipal Court is set forth at pp. A18-A20 of the Appendix.

JURISDICTION.

The judgment of the Supreme Court of New Jersey was entered December 4, 1974. A timely motion for rehearing was denied on January 14, 1975 (App. p. A4). On March 21, 1975 Mr. Justice Brennan made an Order extending the time to file this petition to June 13, 1975 (p. A1). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) as involving rights, privileges and immunities under the Constitution, and federal questions of substance.

QUESTIONS PRESENTED.

1. Was defendant/petitioner denied Procedural Due Process when:

> (a) At the trial, the State failed to establish a prima facie case by not presenting any proof of an

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essential adjudicative fact, i.e. the scientific accuracy and reliability of an electro-mechanical speedmeter system (not theretofore judicially noticed in any reported case), relying instead upon the Magistrate's personal experience and opinion as to the fact, contrary to fundamental evidence law;

(b) On appeal, the Court misapplied the New Jersey Rules of Evidence on judicial notice, i.e. by disregarding the limited-scoped Rule 12 which restricts the use of noticeable material on appeal, and impermissibly relying upon the broad-scoped trial Rule 10, but failing to hold the required adversary hearing?

2. Was defendant/petitioner denied the right of Confrontation when the Appellate Division of the New Jersey Superior Court, under the guise of taking judicial notice, *post argument*, of a crucial element of ultimate fact in the State's case:

(a) cited and relied upon expert opinion testimony in the trial transcript of a case simultaneously decided by the Appellate Division where this defendant/petitioner was not a party and of which he had no notice prior to the decision, sub judice;

(b) requested and received from the State, then cited and relied upon, affidavits, letters and other private and unpublished writings dealing with said ultimate fact, which papers were allegedly signed and/or authored by persons who never appeared before the Court, and which do not qualify as hearsay-rule exceptions?

3. Was defendant/petitioner further denied Due Process and the right of Confrontation when the Supreme Court of New Jersey at oral argument permitted the State "to expand the record" by submission to that Court (for the first time ever) *private* letters and questionnaire/answers expressing *opinions* and *conclusions* of persons out-of-state (and never before this defendant or any Court) relating to an ultimate factual issue in the case, all solicited and procured by the Attorney General *after* the Appellate Division decision and *after* certification was granted?

4. Was defendant/petitioner denied Ex Post Facto protection of Article I, Section 10 of the Constitution when the Appellate Division made a finding of a *legislative fact* not theretofore cognizable in any reported case anywhere, and applied same to petitioner retroactively?

CONSTITUTIONAL PROVISIONS INVOLVED.

Article I, Section 10, Clause 1 (ex post facto); Amendment V (due process); Amendment VI (confrontation); Amendment XIV (due process), are set forth at p. A21, *infra*.

STATUTES INVOLVED.

Rules 9, 10, 11 and 12 of the New Jersey Rules of Evidence (2A N. J. S. A. 84A) are set forth at pp. A22 to A24, *infra*.

STATEMENT OF THE CASE.

The basic problem is one of Evidence, more particularly Judicial Notice. Thus we ask the Court's indulgence in this unusually lengthy statement to describe the State's numerous submissions in the Courts below, which we claim are repugnant to Due Process. We feel that the Courts below have taken a dim view of the importance of the evidentiary and Constitutional issues because of the minor nature of the alleged offense.[1] But it is in the very courts in which such offenses are tried that most citizens have their only contact with "the law", and where the administration of justice is in sad repute. In our State it is the subject of continuing public discussion. Unfortunately, decisions of such courts evade review because of complacency, but more frequently because of the economics of the process.

This is a quasi-criminal case in which the petitioner was charged with "speeding 75.3 M. P. H. in 55 M. P. H. zone" on May 5, 1973. The summons, issued by a Trooper of the New Jersey State Police indicates the charge is based upon the use of a speedmeter device called Vascar.

The device is allegedly a system of several electro/mechanical units, interconnected by cables, attached to the transmission, speedometer and dashboard of the trooper's auto, and is powered by the car's battery. The dashboard unit contains switches, buttons and knobs, to be operated by the trooper, as well as a digital read-out screen. "Vascar" is an acronym, the registered trademark of the manufacturing and marketing corporation.

The petitioner pleaded not guilty and the trial was held in the evening of July 23, 1973 before a part-time Magis-

1. Except that the Supreme Court of New Jersey did grant certification, which makes its final affirmation without opinion seem anomalous.

trate in the Municipal Court, Folsom Borough, Atlantic County. The State Trooper was the only prosecution witness. The only evidence as to defendant's speed was the Trooper's testimony at page 18 line 14 of the trial transcript, that he had "obtained a reading of 75.3." Petitioner, appearing pro se, had objected initially to any "Vascar" testimony and later moved to strike, on the grounds that the scientific accuracy and reliability of the Vascar system had not been proved and that there was no authority for the Court to take judicial notice of same.[2] The Magistrate, at page 3 of the trial transcript denied that he was taking judicial notice and proceeded at length to explain the "demonstrations of Vascar" which he had previously received from the State Police. He held the evidence admissible upon his personal knowledge, upon his reading of the manufacturer's manual which "they were happy to disseminate" without charge, and on his opinion and assumption that the use of the device was "an acceptable means of measuring speed" (App., p. A19). Defendant testified denying the charge. There was no other testimony.

The Magistrate found the defendant "guilty of traveling 75.3 miles an hour in a 55 mile zone." (App., p. A20). He imposed a fine of $20 and costs of $10 and revoked defendant's driving privileges for 30 days. The fine and costs were paid; the revocation was stayed the next day by a County Court Judge pending appeal.

Defendant appealed to the Atlantic County Court which heard the matter de novo on the record below. That Court affirmed the judgment by oral opinion. Petitioner

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2. To this date (except for the case sub judice) in no reported case anywhere in the United States has a court taken judicial notice of Vascar. In one reported case *People v. Leatherbarrow*, 69 Misc. 2d 563, 330 N. Y. S. 2d 676 (County Ct. 1972), the Court refused to take judicial notice because "neither our legislature nor any higher court has as yet granted these devices per se acceptance in this State."

first raised the Constitutional question of Due Process[3] in his brief and oral argument in the County Court. The State did not submit a brief.

Petitioner appealed to the Appellate Division of the Superior Court of New Jersey on the grounds raised in the Municipal and County Courts. The State completely misstated, and erroneously argued, that the Courts below had taken judicial notice of the scientific accuracy and reliability of the Vascar system, and, in support of that contention, cited in its brief material and papers not of record in the case, not of public record, *not theretofore published,* and not available in any reference library in New Jersey or its environs.[4]

After oral argument, the Presiding Judge, by letter, directed the Attorney General to submit "originals" of the material cited. The Attorney General did not do so but instead submitted "reproductions" of the same and additional material, as well as 4 letter/affidavits of Vascar salesmen and 2 affidavits by a Major of the New Jersey State Police. In addition the State submitted a specious document consisting of 116 pages of what appears to be an "edited" and unidentified trial transcript called "Attorneys Guide for Defense in Vascar Citations." This consists of the "testimony" of 3 employees of the Vascar manufacturer, and a police officer. There is no name or signature of any reporter, author, editor, publisher or sponsor of this incredible piece of hearsay.

The following exchange of correspondence between the Presiding Judge of the Appellate Division and the Deputy Attorney General, together with our annotations, best illustrate the "issue" as viewed by the Appellate Division, and the obvious "source" of that Court's error.

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3. Inadmissibility of the State's "evidence", failure to make a prima facie case, and failure to sustain beyond-a-reasonable-doubt burden of proof.

4. Petitioner made an exhaustive search and so stated in his briefs, which fact is not disputed.

The appeal in the Appellate Division was argued March 4, 1974. The next day the Presiding Judge wrote the following letter:

"Robert A. Rubenfeld, Esq.
Deputy Attorney General
Division of Criminal Justice
Appellate Section
7 Glenwood Avenue
East Orange, New Jersey 07017

"Re: *State v. Harold Finkle* (A-436-73)

"Dear Mr. Rubenfeld:

"I have examined the pamphlet 'Understanding The Breathalyzer, Vascar and Speed Radar' prepared by the Institute for Continuing Legal Education which you left with the Court yesterday. I trust that you understand the various studies of Vascar reprinted in the pamphlet will not do for the Court's purposes. We will require copies of the studies from those sources which supplied them to the Institute for Continuing Legal Education when the pamphlet was prepared. I trust that you will be good enough to undertake to obtain these original studies for the Court at the earliest date possible. One copy will suffice for the Court providing one copy of each is served on your adversary.

"Any other studies or authorities relative to the reliability of Vascar not set forth in the pamphlet would be welcomed by the Court.

"Very truly yours,

/s/ MILTON B. CONFORD

"MBC:FE

"CC: Morgan E. Thomas, Esq."

On March 8, 1974 the Deputy Attorney General responded as follows:

"Honorable Milton B. Conford
601 Bangs Avenue
Asbury Park, New Jersey 07712

RE: State v. Harold Finkle
Appellate Division—Part B
Docket No. -436-73

"Dear Judge Conford:

"Please find enclosed:

"(1) The following affidavits describing the number of VASCAR devices in use and operation in New Jersey.

a. Donald L. Smalley, Major, New Jersey State Police, in charge of operations.

b.[5] Lee J. Tamburrino, Treasurer of Nat Alexander Company, Laurel Springs, New Jersey.

c.[5] Martin J. Dugan, President of Warner Communications Co., Inc. Upper Montclair, New Jersey.

d.[5] James Schroeder, Vice-President of Radio Communications Company, Freehold, New Jersey.

e.[5] Henry P. Bergson, Regional Manager of Federal Sign & Signal Corporation, Signal Division, Pleasantville, New York.

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5. These men are Vascar sales/promotion people for Federal Sign & Signal, the manufacturer and trade-name owner. Mr. Bergson also attached a so-called "User's List" as of May 1971.

"(2) The original sources for the ICLE publication,[6] *Understanding the Breathalyzer, VASCAR and Radar, Part II.* This includes: Evaluation of VASCAR, by Loren E. Dykeman, Patrolman (Iowa Highway Patrol, 1968);[7] *Retesting of VASCAR Operators: The Effect of a One-Year Period of Use,* by Forrest M. Council (University of North Carolina Highway Safety Research Center, 1969); The Evaluation of VASCAR by the IIT Research Institute, Chicago, Illinois;[7] *Evaluation of "VASCAR",* by Trooper Denneth A. Maciejewski (Michigan State Police, 1967).[7]

NOTE: This material serves to illustrate that everything was electronically stenographed by the ICLE. (See #3).

"(3)[6] The ICLE publication, *Understanding the Breathalyzer, VASCAR and Radar, Part II* (Rutgers University, 1974).

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6. Some of the terminology used by the State is astonishing and creates a misleading implication. Citing the ICLE pamphlet as a "publication" of *Rutgers University* is a gross distortion of the truth. In a letter from ICLE submitted to the Appellate Division in our Supplemental Brief, its Director stated that all of the pamphlet materials were received "from Henry P. Bergson," *supra;* that "we do not ascertain or verify the credentials of the various 'authors'; that ICLE leaves it to each 'registrant' to 'determine the reliability of each separate item'"; and that "ICLE does not vouch for the legal and technical scholarship of any [of the] material." Another significant fact on the issue of judicial notice is that this pamphlet did not reach the New Jersey State Library until June 11, 1974, and Rutgers University Law Library some 2 weeks later (more than 3 months after the Appellate Division took the case under advisement, and more than one month after its decision). We have not been able to ascertain the meaning of the profound words "electronically stenographed." But the real fact is that each of the so-called "original sources" is page-numbered exactly as it appears in the ICLE pamphlet, which means that it was photo-reproduced directly from the pamphlet, which itself is photo-reproduction of typewritten material. To call this "original sources" is a hoax. We brought all this to the attention of the Appellate Division which ignored our remarks in spite of its own letter of March 5, 1974, *supra.*

"(4) [7] *Evaluation of A Device for Checking and Recording The Speed Of A Moving Automotive Vehicle,* by Walter E. Onderko (The Franklin Institute, Philadelphia, Pennsylvania, 1960).

"(5) [7] *Evaluation of A Device for Checking The Speed of a Moving Automotive Vehicle,* by James D. Nossett, Trooper, and Jack R. Burlison, Communications Technician (Indiana State Police, 1966).
also,

"(6) [8] *Federal VASCAR II,* Bulletin 58, by the Federal Sign & Signal Corporation, Signal Division, Chicago, Illinois (November, 1973).

"(7) [9] *Attorneys Guide for Defense in VASCAR Citations,* used in the ICLE seminar on VASCAR, in January, 1974.

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7. Each so-called "Evaluation" by a police agency was done by the particular Trooper or Patrolman as test or experiment of a single instrument *before* the agency ever used the device in the field. The IIT (not "ITT" as the Appellate Division opinion says) "evaluation" is a private letter to the manufacturer reporting on a laboratory test of the electronic system. The so-called "Franklin Institute" evaluation was a report on a testing of "a bread-board model" by the *commercial laboratory* of the Institute upon a contract/request of the "inventor". The "report" is *not* in the Institute's famous library or catalogue. The North Carolina study refers to and relies for "evaluation" and opinion upon the Franklin and Indiana "reports." The "authors" are not identified as to credentials, discipline, technological or scientific skill and experience, or education. A sorry collection of "experts" or "authorities", indeed.

8. This is nothing but a sales/promotion brochure of the manufacturer. It is amazing that the State thought a piece of this kind was even proper material for submission. It is even dated 6 months *after* the alleged offense.

9. This strange "document" was briefly described, *supra.* Oddly enough, it has a "Forward" which says, in part:

"There can be no question that the accuracy of the Vascar unit depends in part on the ability of the operator to make the re-

"Finally, I hope to furnish a letter from Forrest M. Council stating that the University of North Carolina Highway Research Center conducted independent studies of VASCAR, in an objective and scientific manner.

"Very truly yours,

/s/ ROBERT A. RUBENFELD
Deputy Attorney General

"RAR:snc
"encls.
"CC: Honorable H. Curtis Meanor
Honorable Alan B. Handler
Morgan E. Thomas, Esq.
Mrs. Elizabeth McLaughlin"

On March 13, 1974, the Presiding Judge of the Appellate Division wrote the following amazing letter to the Deputy Attorney General:

"Robert A. Rubenfeld, Esq.
Deputy Attorney General
Division of Criminal Justice
Appellate Section
7 Glenwood Avenue
East Orange, New Jersey 07017

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9. (Cont'd.)

quired visual observations and to throw the required switches in a precise way." (A point we made below).

* * *

"Science marches forward and, as the courts were confronted with the problem of accuracy of radar in the mid-50's, *the courts in the early 1970's will probably be confronted with the problem of the scientific accuracy and use of Vascar.*" (Emphasis added.)

"Re: State v. Harold Finkle (A-43-73)

"Dear Mr. Rubenfeld:

"Among the documents you have sent me in connection with the above matter is an affidavit by Major Donald L. Smalley of the New Jersey State Police concerning the number and deployment of VASCAR units throughout the state. The affidavit does not state that these units are now in regular use by the State Police in these areas nor any conclusion as to whether they have proven to be satisfactory and accurate in the opinion of the State Police.

"The Court would like to have a supplemental affidavit by Major Smalley with respect to the additional matters which I have noted.

"Very truly yours,

"/s/ MILTON B. CONFORD

"MBC:FD

"CC: Morgan E. Thomas, Esq."

And, quite predictably, Major Smalley responded with "a supplemental affidavit" in which he gave "the opinion of *the State Police*" requested by the Judge, which the latter then quoted (App., p. A12):

"they have consistently proven to be a scientifically accurate and reliable instrument in determining the speed of motor vehicles."

After the May 6, 1974 decision of the Appellate Division, defendant petitioned the Supreme Court of New Jersey for certification under N. J. Court Rule 2:12 to review the judgment of the Appellate Division. Certification

was granted. The record on the petition, and on the appeal after granting certification, is the briefs, appendices and transcripts filed in the Appellate Division, as well as the aforementioned letters and the State's "submissions."

No additional briefs were submitted, but on November 6, 1974 (12 days before the Appeal was argued in the Supreme Court) the Attorney General filed a motion "to expand the record" and proffered a group of letters and questionnaires (with the responses and answers) addressed to each of the "sources" listed in Items (2), (4) and (5) of his letter to Judge Conford dated March 8, 1974.

The typical letter reads:

"To Whom It May Concern:

> "As you may, or may not, know the Appellate Division of the New Jersey Superior Court has taken judicial notice of the scientific accuracy and reliability of the Vascar (Visual Average Speed Computer and Recorder). See *State v. Finkle*, 319 *A. 2d* 733 (1974).
>
> "In November of this year I will be arguing this same case before the New Jersey Supreme Court. As I have relied upon your material (* * *) it would be of great assistance if you would kindly fill out the enclosed questionnaire.
>
> "Thank you for your consideration in this matter.
>
> A prompt response would be greatly appreciated.
>
> "Very truly yours,
>
> /s/ Robert A. Rubenfeld
> Deputy Attorney General"

The "questionnaire" enclosed was as follows:

"(1) Name of article on Vascar (and date)

(2) Author(s)

(3) Author's qualifications

(4) Why the Article was written (funding, State Agency request, etc)?

(5) Why may this study be deemed independent (i.e., its conclusions need not be verified with outside sources)?

(6) Have your data been updated in any way?

(7) Are you aware of any other studies on the Vascar?

(8) Your opinion of the reliability and accuracy of the Vascar?"

We filed a vigorous opposition to this motion principally on the ground that the motion was a ruse to infuse the record with additional hearsay and "opinion" evidence in an impermissible fashion; that there is no rule or provision of law which permits unilateral interrogatories on appeal; and that a piece of paper cannot be cross-examined. We contended that there was now presented a further serious Rules and Due Process question and suggested that if the Court were inclined to grant such a motion then we should be given an opportunity to particularly address ourselves to the specific matters. The Court did not give us that opportunity but granted the motion on argument day (App. p. A3).

REASONS FOR GRANTING THE WRIT.

The judgments of the Municipal Court and of the County Court (de novo) constitute a denial of Due Process in that they were based upon inadmissible evidence in that the State failed to make a prima facie case and thus failed to meet the proof required by *State v. Wenzel,* 113 N. J. Super. 215, 273 A. 2d 395 (App. Div. 1970):

> "Prosecution for a motor vehicle violation is a quasi-criminal proceeding and the State has the burden of establishing all *elements* of the offense *beyond a reasonable doubt.*" (emphasis added).

This is the well-settled rule in New Jersey. Cf. *State v. Ring,* 85 N. J. Super. 341, 204 A. 2d 716 (App. Div. 1964), cert. den. 44 N. J. 407, 209 A. 2d 142 (1965), cert den. 382 U. S. 812, 86 S. Ct. 24.

This Court in *Vachon v. New Hampshire,* 414 U. S. 478, 94 S. Ct. 664, 38 L. Ed. 2d 666 quoted from *Harris v. United States,* 404 U. S. 1232, 1233, 92 S. Ct. 10, 30 L. Ed. 2d 25, as follows:

> "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due process."[10]

The Appellate Division totally misconceives the real issue *in this case.* At the outset of the opinion (App. p. A6, last sentence) it says "the substantial question before

10. We cited these and other cases of this Court on this crucial point in our briefs in the Appellate Division.

Compare also the opinions of this Court dealing with "inferences" and "presumptions," requiring *beyond a reasonable doubt* standard of proof. *Leary v. United States,* 395 U. S. 6, 89 S. Ct. 1532; *Turner v. United States,* 396 U. S. 398, 90 S. Ct. 642.

us . . ." is whether *that Court* is warranted in taking judicial notice of the scientific accuracy and reliability of Vascar. It completely fails to see that the real question is whether this defendant had a due process trial and whether he was found guilty *beyond a reasonable doubt* upon *admissible evidence.*

Whether the Vascar question is ripe for judicial notice may be a legitimate concern for some court in an appropriate context and environment. But for the Appellate Division to proceed on the notion that it *must* do so in this case, is to distort the Evidence Rules, and indicates a prejudgment and bias in favor of the State. It is a sort of institutionalized bias and prejudgment that has pervaded this case from the beginning in the Municipal Court. The Magistrate's predisposition is demonstrated throughout the trial transcript, and is typified by his remarks at A19 of the Appendix, and that of the Presiding Judge in the Appellate Division is epitomized by his written request for "the opinion of the State Police" which elicited the predictable response, as well as the additional impermissible material, which the Court readily embraced.

Both Courts start out with a presumption in favor of the State. The Magistrate did not even call it judicial notice. The Appellate Division engaged in an ex parte exercise that is not countenanced by the Rules of Procedure and of Evidence, or the simple perspective of fairness.

In our Reply Brief and Supplemental Brief in the Appellate Division and in the Petition for Certification in the Supreme Court of New Jersey we commented at great length, and emphatically pointed out the impropriety of the Court's consideration and reference to the tenuous, unauthenticated and unauthoritative material, described under Statement of the Case, *supra.* We said, and repeat, that the Court went far beyond the realm of "taking judi-

cial notice" and was actually receiving and considering raw evidence that would not have been admissible in an evidentiary trial or hearing. Judge Conford says (App., p. A16):

> "Copies of all material considered by the court have been furnished to defendant, and he employed the opportunity to attack its probative force as well as its admissibility. See Evidence Rule 10(1).[11] It is *implicit* that the Court would have received from defendant *authoritative data* disparaging the reliability of Vascar. None has been received nor does the Court know of any. The contentions in respect of the hearsay rule and due process rights are without merit." (emphasis and footnote added).

Having insisted upon the impropriety of the State's submission, we thought it even further inappropriate for us to match that exercise with submission of opinion evidence of our own in the raw form of statements and affidavits, *at the appellate stage of the case,* without properly exposing it to all the tests of cross-examination and exacting scrutiny available only in a genuine adversary environment.

Until the decision in the Appellate Division we had no way of knowing how the Court would handle the material submitted. The Attorney General had *not* requested the *Appellate Division* to take judicial notice, and the Court never indicated that it proposed to do so. The State still (erroneously) contended that the Magistrate and the County Judge *had* taken judicial notice.

Simultaneously with this decision a different panel of the Appellate Division handed down a Per Curiam decision

11. The Rule is inapplicable. It, with Rule 9(3), prescribes procedure at trial.

in *State v. Salup,* 128 N. J. Super. 209, 319 A. 2d 739, affirming a county court conviction in a Vascar case where an expert witness had testified for the State.

When Judge Conford (App., pp. A6 & A7) refers to the "adduction of expert proof" and to "the record" in *Salup* he is again impinging (in very subtle fashion) upon the due process and confrontation rights of this defendant/petitioner. Until our Appellate Division decision we had never heard of the *Salup* case.[12] We then read *that* trial transcript and found stipulations and concessions of counsel, and a general handling of the case, which are not binding on this defendant, and are even contrary to the legal and factual aspects of our case.

Up to the time of the Appellate Division decision, sub judice, there were only 4 reported Vascar cases in all of the United States:[13]

People v. Persons, 60 Misc. 2d 803, 303 N. Y. S. 2d 728 (Town Court 1969); *Tiffin v. Whitmer,* 32 Ohio Misc. 169, 290 N. E. 2d 198 (Mun. Ct. 1970); *State v. Schmiede,* 118 N. J. Super. 576, 289 A. 2d 281 (County Court, March 1972). In each of these three cases an expert testified for the prosecution as to the scientific accuracy and reliability of VASCAR. None testified for the defense. Each defendant was convicted on the evidence adduced at his trial.

However, in the fourth reported case, which is precisely like the case sub judice, the conviction was reversed and the information dismissed. *People v. Leatherbarrow,* 69 Misc. 2d 563, 330 N. Y. S. 2d 676 (County Court, April 1972). We are sorely distressed, with due respect, that Judge Conford in his footnote No. 1 (App., p. A6) quoted *Leatherbarrow* out of context in two instances. The *full*

12. It is curious to note that in *Salup,* that panel mentioned the decision in *Finkle* but *did not* adopt the *judicial notice* concept.

13. We have not been able to find any other reported case to date.

text of those two paragraphs presents the truer significance of that opinion which is predicated on substantive law and "applicable rules of evidence."

The cases cited in *Leatherbarrow* are some of the significant precedents dealing with the long controversy over the Radar speedmeter. Another is *State v. Dantonio,* 18 N. J. 570, 115 A. 2d 35; 49 A. L. R. 2d 460, which the Appellate Division, sub judice, erroneously perceives. It fails to recognize that the conviction in *Dantonio* was sustained on the basis of the *evidence* adduced *at the trial,* and *then* the Supreme Court of New Jersey ruled that *thenceforth* judicial notice could be taken of the scientific accuracy and reliability of that speedmeter.

The evidentiary criteria in the radar cases are the universally recognized standards for judicially noticing the scientific accuracy and reliability of mechanical and electronic evidence. In the radar cases, as even in the other cases cited by the Appellate Division dealing with judicial notice, those Courts referred to and relied solely upon the evidence and writings of accredited scientists and engineers of renown, and upon recognized legal authorities, all of whose writings appeared in widely-circulated and authoritative publications where they were exposed to the critical scrutiny of the technological and legal communities. How can a justifiable comparison be made to the aged and unpublished "studies" made by that unknown, faceless group of individuals put together by the manufacturer of the Vascar device under the impressive cover of the I. C. L. E.

Though New Jersey Evidence Rule 12 gives an appellate court the authority to take judicial notice of matter permitted by Rule 9, it does not allow the discretion and flexibility permitted by Rule 10, which, together with the last paragraph of Rule 9, requires an adversary hearing at the trial level.

Rule 9(2)(e):

"specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources of reasonably indisputable accuracy."

Rule 10(2)(a):

"any source of relevant information may be consulted or used . . ."

Rule 12 refers only to Rule 9 and therefore does not permit the "use" of "any source." This is entirely understandable because Rule 12 does not compel a Rule 10-type hearing.[14]

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14. The official Handbook on New Jersey Rules of Evidence (Gann Ed. 1972) sponsored by the State Rules of Court Review Commission, with its excellent comments and annotations on all the Rules, embraces and quotes, at page 49, from the Report of the New Jersey Supreme Court Committee on Evidence (1963 ed.) this Comment on Rule 12:

> "If a court considers a question of sufficient importance, its members should not engage in ex parte exploration of the issue without giving the parties some opportunity to present information to the court or argue the point. In appellate practice the normal time for this would be at oral argument. If an issue of sufficient importance arises thereafter, supplemental briefs or additional argument may be in order . . ."

Professor Kenneth Davis, that staunch advocate of judicial notice of legislative facts, in an essay entitled *Judicial Notice Based on Fairness* in "Perspectives Of The Law" (1964), Pound, Griswold, Sutherland (editors), said:

> "The ultimate principle is that extra-record facts should be assumed whenever it is convenient, except that convenience should always yield to the requirement of procedural fairness that parties have the opportunity to meet in appropriate fashion all facts that influence the disposition of the case.
>
> "When a noticed fact is challenged the tribunal should allow the challenge except when the noticed fact is so clear that the purpose of the challenger seems improper, such as delay. The tribunal must use its discretionary power to allow evidence subject to cross-examination whenever procedural fairness and convenience call for such procedure."

An examination of the Rules history shows that the 1963 committee of draftsmen (the Jacobs Committee) had proposed more expansive language, e.g., in Rule 9 a provision for "*deciding what the*

The error of the Appellate Division is in the fact that, while it accurately cited the provisions of Rule 9(2)(d) and Rule (2)(e), it completely ignored Rule 12 and, instead, *improperly* invoked the *trial* Rule 10 (App., pp. A22-A24). It compounds the error by claiming for itself a "discretionary" power under "the taking of judicial notice" which overrides defendant's claims regarding "hearsay" and "due process" (App. p. A15). It extends that "discretion" to the "any source" provision which is inapplicable on appeal.

The judicial notice rules confer a discretionary power on the Court only to the extent that it may or may not avail itself thereof, but there is no discretion as to *the kinds of facts and propositions which may be noticed,* and, we submit, it is an abuse of discretion and of judicial responsibility to subvert the procedure. No precedent can be found in New Jersey (at least) for such an extraordinary use of the judicial notice authority.

This misapplication of the New Jersey Rules of Evidence constitutes a denial of Procedural Due Process, and as a consequence of that error, the Appellate Division denied the petitioner the right of Confrontation by wrongfully basing its decision upon affidavits, letters, "reports" and "studies"—all of it pure hearsay. This material could not possibly qualify under any exception to the hearsay rule;[15] and is impermissible under *Chambers v. Mississippi,*

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14. (Cont'd.)
law ought to be", and in Rule 12 incorporating the exact *"any source"* provision of Rule 10, *supra.* That Report was *not adopted,* and the *finally enacted Rules* as promulgated by the Guarini Commission *(1967) eliminated both* those propositions. It leaves no doubt as to what the Rules are intended to mean regarding the "indisputibility" of noticeable facts. See McCormick on Evidence (1972) Sec. 333 and 334.

15. The Uniform Rule on Learned Treatises, 63(31) was not adopted by New Jersey. Business Entries 63(13), Reports and Findings of Public Officials 63(15), and 63(16) are inapplicable under the circumstances in the Appellate Division.

410 U. S. 284, 93 S. Ct. 1038; *Davis v. Alaska,* 415 U. S. 308, 94 S. Ct. 1105; *United States v. Williams,* 431 F. 2d 1168 (C. A. 5th, 1970); *Mattox v. United States,* 156 U. S. 237, 242, 243, 15 S. Ct. 331, 339; *California v. Green,* 399 U. S. 149, 26 L. Ed. 2d 489.

We are perplexed by a problem of a very sensitive nature. We are grieved that it is necessary to criticize the opinion of the Appellate Division in a way that may appear disrespectful, but hasten to say that is not our intent. The opinion is drawn with great skill, but it is the craftsmanship of an advocate. It is biased and prejudges the issue. We feel compelled to call attention to a few examples of a seriously misleading situation. At A15 of the Appendix, the out-of-context quote from McCormick on Evidence (1954) implies the converse of that author's commentary. And at A14 the seemingly impressive quote from *State v. Johnson,* 42 N. J. 146, 171 is an unimportant comment not at all reflective of that important opinion, which dealt with actual expert evidence at *trial* as well as authorities of impeccable distinction. At A13 to A14 the reference to several important precedents soundly complements Evidence Rule 9, but the citations are inapposite to the Court's *conclusions.* The question-begging conclusion at A16 and the statement beginning at bottom of A10 subtly interject erroneous presumptions. Again at A13 the opinion says: "We accept the reprints of the others as authentic in view of the academic credentials of the publisher and compiler." This is in direct contradiction to the letter of the Director of ICLE, which was before the Court, in which he said: ". . . we do not ascertain or verify the credentials of the various 'authors' . . ." and "ICLE does not vouch for the legal and technical scholarship of any material (etc.)." These and other similar aspects of the opinion cumulatively indicate an inordinate compulsion on the part of the Court

to establish a judicial notice authority and precedent *in this case,* despite the Rules and due process requirements.[16]

The further Constitutional question of Ex Post Facto is also to be considered. Assuming, arguendo, that the Appellate Division acted in a permissible manner, it took notice of a *"legislative fact."* Since the material upon which the decision is based was admittedly not available or known in New Jersey until the case was heard by the Appellate Division, March 4, 1974, it could not have been the basis for such an adjudication on July 23, 1973, the date of the trial in Municipal Court, or October 9, 1973, the de novo hearing in County Court. Having the legal effect of a legislative enactment, it is after the fact of the charge against the petitioner, and therefore is inapplicable to this petitioner/defendant.

All of the foregoing was raised and set forth in the Petition to the Supreme Court of New Jersey for Certification to review the decision of the Appellate Division.

Certification was granted, and, as is customary in New Jersey, the appeal was heard on the briefs and the record below, including all the material that had been submitted by the Attorney General to the Appellate Division. In addition, at oral argument, the Court granted the State's motion to "enlarge the record."[17] We had vigorously op-

16. Even long prior to the precise proscriptions of the Judicial Notice Rules, Mr. Justice Cardoza speaking for this Court in a non-criminal case, *Ohio Bell v. P. U. C. of O.*, 301 U. S. 292, 81 L. Ed. 1093, deplored the compromise of due process, "on the footing of convenience or expediency." He also said at p. 302:

> ". . . to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

17. The very fact that the Attorney General and the Supreme Court thought it necessary "to expand the record" by *supplementing and explaining* the material already submitted in the Appellate Divi-

posed this motion on the grounds that the new material sought to be submitted under the guise of "enlarg(ing) the record" was (1) a group of private and self-serving letters and statements containing conclusions and opinions of various police and others on an ultimate question of fact in the case, (2) was new material not of record below, and (3) was contrary to N. J. Court Rule 2:12-6. It was thus not consistent with due process, contrary to evidence law and rules, and denial of the right to confrontation.

We made a timely motion to the Supreme Court of New Jersey for rehearing which was denied without comment. We based our motion on the fact that the Court having granted certification on the constitutional grounds raised in our Petition, recognizing probable cause for review, and in view of the cavalier manner in which the Appellate Division had treated those questions, it seemed anomalous that the Supreme Court would make no comment on those issues in its decision on appeal.

Thus, we submit, the Supreme Court of New Jersey not only condoned the error of the Appellate Division but affirmatively committed the same kind of error. If this judgment is the result of the "petty" nature of the offense involved, it is most regretable. Such casual regard for evidence law and very basic rights is astonishing, and such dubious precedent portends ill-fated consequences for the judicial notice doctrine.

We are mindful of (and, indeed, appalled at) the carnage on the highways. We acknowledge the necessity to curb excessive speed. But the overriding concern is with the indiscriminate resort to an expediency that sacrifices

17. (Cont'd.)
sion makes it clear that the material cannot stand on its own and is subject to question and doubt. Certainly such a situation does not meet the Rule 9 requirement of "generally known", "common notoriety", "cannot reasonably be the subject of dispute", "generalized knowledge", "sources of reasonably indisputable accuracy."

evidence law and the integrity of the judicial process. Courts ought not encourage the "odious doctrine" (as Mr. Justice Brandeis called it) that the end justifies the means.

CONCLUSION.

We are hard-pressed to understand the failure of the Supreme Court of New Jersey to deal with the constitutional errors in the courts below. Petitioner requests the granting of the Writ of Certiorari so that the judgments below may be reviewed in the Supreme Court of the United States.

Respectfully submitted,

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Appendix.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES

No. A-771.

HAROLD FINKLE,

Petitioner,

v.

NEW JERSEY.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 13, 1975.

/s/ WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 21 day
of March, 1975.

POOR COPY

OPINION OF SUPREME COURT OF NEW JERSEY

(66 N. J. 139, 329 A. 2d 65).

SUPREME COURT OF NEW JERSEY

A-71 SEPTEMBER TERM 1974

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

HAROLD FINKLE,
Defendant-Appellant.

Argued November 18, 1974. Decided December 4, 1974.

On appeal from Superior Court, Appellate Division, whose opinion is reported at 128 *N. J. Super.* 199.

Mr. Harold Finkle, of the New York Bar, argued the cause for appellant (*Mr. Morgan E. Thomas,* attorney).

Mr. Robert A. Rubenfeld, Deputy Attorney General, argued the cause for respondent (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney).

PER CURIAM

The judgment is affirmed substantially for the reasons expressed by the Appellate Division.

ORDER TO EXPAND RECORD.

(Filed November 19, 1974)

SUPREME COURT OF NEW JERSEY

M-278 SEPTEMBER TERM, 1974

STATE OF NEW JERSEY,
Plaintiff-Movant,

v.

HAROLD FINKLE,
Defendant-Appellant.

Order.

This matter having been duly presented to the Court, it is ORDERED that the motion to expand record is granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 18th day of November, 1974.

FLORENCE R. PESKOE,
Clerk.

ORDER DENYING REHEARING.

(Filed January 14, 1975)

SUPREME COURT OF NEW JERSEY

M-458 SEPTEMBER TERM 1974

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

HAROLD FINKLE,
Defendant-Movant.

Order.

This matter having been duly presented to the Court, it is ORDERED that the motion for rehearing is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 14th day of January, 1975.

FLORENCE R. PESKOE,
Clerk.

OPINION OF APPELLATE DIVISION OF SUPERIOR COURT OF N. J. (128 N. J. Super. 199, 319 A. 2d 733).

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION.

DOCKET NO. A-436-73.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

HAROLD FINKLE,
Defendant-Appellant.

Argued March 4, 1974—Decided May 6, 1974.

Before Judges CONFORD, HANDLER and MEANOR.

On appeal from Atlantic County Court.

Mr. Morgan E. Thomas argued the cause for defendant.

Mr. Robert A. Rubenfeld, Deputy Attorney General, argued the cause for plaintiff (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney [*Mr. George F. Kugler, Jr.,* former Attorney General of New Jersey]).

The opinion of the Court was delivered by
CONFORD, *P. J. A. D.*

Defendant challenges his conviction of driving 75.3 miles per hour in a 55 m.p.h. zone on U. S. Rt. 322 on May 5, 1973, primarily on the ground that the evidence of his guilt rests solely on a reading of his speed by a VASCAR device operated by a State Trooper. The contention is that expert testimony as to the reliability of the device, which was not here presented before the trial tribunals, is an essential prerequisite for the admissibility of such evidence. The State takes the position that the scientific reliability of the device is a proper subject of judicial notice and that both the accuracy of the instrument used and the qualifications of the trooper who employed it were fully established by evidence adduced at the trial before the Municipal Court of Folsom Borough. The conviction in that court was affirmed in a trial *de novo* on the municipal court transcript before the Atlantic County Court.

The general reliability of the VASCAR device was held to have been established by expert proof by the Somerset County Court in *State v. Schmiede,* 118 *N. J. Super.* 576 (Cty. Ct. 1972), where a conviction for a speeding offense proven by a VASCAR reading was affirmed. We arrived at the same conclusion, also by reason of the adduction of expert proof on the subject before the trial court, in *State v. Salup,* which is being decided simultaneously herewith. — *N. J. Super.* —. There is no reported New Jersey case in which a conviction based on VASCAR-derived evidence has been reversed, or where VASCAR readings have been rejected as evidence, on account of the unreliability of the device.[1] The substantial question before us

1. In *People v. Leatherbarrow,* 330 *N. Y. S.* 2d 676 (Erie Cty. Ct. 1972) a conviction of speeding based on a VASCAR reading was reversed for absence of "any testimony concerning the theory and mechanics of Vascar's operation or the scientific facts and principles upon which its operation is founded". (*Id.* at 679). This, despite the court's observation that its "independent research has shown

on this appeal is whether sufficient indication of the general reliability of VASCAR is not now available to warrant the court's taking judicial notice thereof so as to dispense with the necessity in each of the scores (if not hundreds) of prosecutions annually based on use of the instrument of submitting expert proof to establish such reliability.

An understanding of the evidence in the present case and of our conclusions as to judicial notice require a description of the VACAR device and of how it functions. The account which follows is derived from the record in *State v. Salup, supra,* the opinion in *State v. Schmiede, supra,* the testimony herein and documents hereinafter mentioned supplied the Court by the State. The principles underlying VASCAR are simple. The apparatus is mounted in and powered by the battery of a motor vehicle. As the operator opens and closes a distance switch it measures the distance traversed by the vehicle during the interim and simultaneously feeds that information into a computer module. The distance is measured by an odometer module which is linked with the speedometer cable of the control car but the measurement is not affected by the accuracy of the speedometer. The VASCAR unit also measures the period of time elapsing between the opening and closing by the operator of a time switch and simul-

1. (Cont'd.)

Vascar to be a relatively simple and undoubtedly accurate mechanism for determining vehicular speed." *Ibid.*

In *People v. Persons,* 303 *N. Y. S.* 2d 728 (Ct. Sp. Sess. Tn. of Pittsford, Monroe County 1969) there was a speeding conviction based on a VASCAR reading supported by expert proof as to its reliability. The judgment was affirmed in an unreported opinion of the Monroe County Court March 24, 1970 wherein the court, although expressing full satisfaction with the reliability of the device, indicated that it would nevertheless be necessary for the State to adduce expert testimony on accuracy in each future case where reliance was solely on the instrument.

taneously feeds that information into the computer module. The switches can be opened and closed, as between distance and time, in any order. When both pieces of information (distance and time) have been stored in the computer there is within a second a computation by the computer module of the speed of a target vehicle, in terms of miles per hour to the nearest one-tenth of a mile, represented by the ratio of the inputs of distance to time as fed into the computer. This figure is flashed to a screen on the apparatus visible to the operator.

The method of use of VASCAR by a police officer in detecting the speed of a target vehicle depends upon whether the clocking car is following the target car, is being followed by it, the cars are approaching each other from opposite directions, or the clocking car is parked alongside the highway while the target car passes by. VASCAR can be used in any of these situations. When both clocking and target vehicles are in motion during the maneuver the technique is as follows. The operator notes the moment when the target car passes a particular reference point, *e.g.*, a bridge, signpost, tree, etc. To avoid problems of depth perception the shadow cast by the object is ordinarily used. At that moment the operator turns on the VASCAR time switch. When the target car passes a second reference point the time switch is turned off. The operator activates the distance measurement by turning the distance switch on and off as the clocking car passes the same two reference points.

When the clocking car is stationary, as in the instant case, it is necessary that the reference points be predetermined and that the clocking vehicle travel the course in advance, thus locking the distance traversed into the computer module before the time measurement is made. That measurement is made as the target vehicle passes from one

of the reference points to the other within the observation of the operator.

Either the time or distance factor may be separately erased from the computer by depressing the appropriate button. Thus a parked police vehicle can check the speed of a succession of passing target cars with only a single distance input.

A more detailed description of the technical features of the VASCAR operation, derived from the expert testimony adduced in that case, is to be found in Judge Meredith's opinion in *State v. Schmiede, supra* (118 *N. J. Super.* at 578-579).

The State's witness in the present case was Trooper Leach. His observation of the defendant's car was from a parked position in a diner driveway adjoining the eastbound lanes of U. S. Rt. 322. The observation took place at 8:30 P. M. on May 5, 1973. At 10:05 A. M. that day the trooper had calibrated the VASCAR unit in the following manner. Using a stop-watch, itself checked for accuracy by radio time, he fed 30 seconds of time into the unit and also a pre-measured half-mile of distance, deriving a reading of 59.8 m.p.h. as against an accurate 60. On feeding 20 seconds of time into the unit (with the same distance input), he derived a reading of 89.8 m.p.h. as against an accurate 90. He adjusted the mechanism by turning a screw, thereby yielding perfect readings of 60 and 90 m.p.h. At 11:20 P. M. the same day another calibration check of the unit in the same manner again produced perfect readings without the need for adjustment.

Prior to taking his VASCAR reading on the defendant's vehicle Trooper Leach had fed into the unit the distance on the highway between the driveway where he parked his car for the check and the shadow of the overpass by which State Highway 54 crosses U. S. Rt. 322, some

distance westerly of the driveway. He parked at a point where he had a clear view of both the overpass and the highway in front of the driveway. As defendant's vehicle, traveling in the west-bound lane, passed the trooper's position, he turned on the time switch and turned it off when the vehicle "hit the shadow" of the overpass. It was dusk, and the shadow was visible although the sun had already set. The unit showed a reading of 75.3 m.p.h. Thereupon the trooper overtook the defendant, showed him the reading on the unit and issued him a summons for driving 75.3 m.p.h. in a 55 mile zone.

Trooper Leach testified that he had 25 hours of instruction and practice with the VASCAR unit and had passed the necessary tests before being certified as a qualified operator of the apparatus by the Superintendent of the State Police in January 1973.

Defendant on cross-examination sought to impair the trooper's credibility by showing that the hour of the test was too late in the day to permit any discernible shadow from the overpass. He also implied that the difference between the time when the measured course distance was fed into the computer and that of the speed check was such as to render use of the distance factor unreliable. He testified that he could not have been driving at 75.3 m.p.h. because he customarily exercised great care to drive slowly on account of a serious heart condition; that when he noticed the lights of the police car behind him he was going "slightly over" 55 m.p.h. in congested traffic; and that he told the trooper when stopped that if the latter had told him he was going 60 m.p.h. "[he] would believe him" but for the trooper to tell him his speed was 75 m.p.h. he would "have to be crazy".

It should be noted that the issue before us is not whether the proofs justify a trial finding of defendant's

speed at 75.3 m.p.h. but rather whether they support an adjudication that defendant beyond a reasonable doubt was proceeding at a rate in excess of 55 m.p.h.—the lawful limit. *State v. Dantonio,* 18 *N. J.* 570, 581 (1955).

The magistrate in the municipal court found the defendant guilty of driving 75.3 m.p.h. in a 55 m.p.h. zone. He gave credence to the trooper's testimony that there was a shadow from the overpass on the road notwithstanding the sun had set at 7:58 P. M. He had previously overruled the objection of absence of expert proof as to the "scientific accuracy" of VASCAR on the basis of his own previous instruction concerning the instrument by the New Jersey State Police and by his study of the manufacturer's detailed manual. The county court judge, in also finding, without the need for expert proof as to the reliability of the device, that the defendant drove at 75.3 m.p.h., opined that VASCAR did not involve "a new scientific principle at all"; that in involved only the principle "that speed is nothing more than distance over time", of which the court could take judicial notice. The fact that the particular machine used could accurately measure distance and time and compute the ratio between them in miles per hour was sufficiently established, in the view of the judge, by the trooper's testimony as to its calibration, and the State had met its burden of proof in respect of the operator's qualifications and as to the reliability of the manner of the actual use of the device.

The name VASCAR is an acronym for "visual average speed computer and recorder". Its prototype was invented by Arthur N. Marshall prior to 1960, and it has since about 1964 been manufactured and widely sold by Federal Sign & Signal Corporation of Blue Island, Illinois. The court in *State v. Schmiede, supra,* found that 6,500 VASCAR units were in use in the United States (as of 1972) (118 *N. J.*

Super. at 580). Information supplied us by the State indicates that the device was in use in 43 states as of May 1971 —by the various state police departments in most of them, and by numerous local police departments. An affidavit by Major Donald L. Smalley of the New Jersey State Police attests that in March 1974 that organization had 325 VASCAR units deployed throughout the State; and the affiant deposes that such units have been used in New Jersey since 1970, the experience of the Division being that "they have consistently proven to be a scientifically accurate and reliable instrument in determining the speed of motor vehicles".

The State has also submitted evidence that 153 VASCAR units have been sold and installed in local police patrol vehicles. Thus a total of 478 units are now operational in New Jersey and presumably in regular use in the enforcement of the statutes and ordinances governing the speed of motor vehicles.

The Franklin Institute of Philadelphia prepared the first engineering evaluation of the initial model of this device. "Evaluation of a Device for Checking and Recording the Speed of a Moving Automotive Vehicle" (1960) by Walter E. Onderko. Comparison of the performance of the machine, in checking the speed of vehicles traveling distances of one-half, one-quarter and one-eighth mile, with calculated speeds obtained from stop watch time and measured distances showed deviations within one mile per hour. An error of 25 feet in judging the position of a vehicle with respect to a marker would produce an error of 2½ m.p.h. based on a vehicle speed of 60 m.p.h. and a distance of one-eighth mile. With the distance increased to one-quarter mile the error is decreased to one and one-half miles per hour.

A pamphlet compiled by the New Jersey Institute for Continuing Legal Education and copyrighted by Rutgers

University, entitled "Understanding the Breathalyzer, Vascar and Speed Radar" (1974), includes reprints of purported evaluations of VASCAR by the University of North Carolina Highway Safety Research Center (1968); the Iowa Highway Patrol (1968); the ITT Research Institute of Chicago, Illinois (1970) and the Michigan State Police (1967). The ITT study was made for the advice of the Florida State Department of Highway Safety. We have secured independent verification of the authenticity of the North Carolina report. We accept the reprints of the others as authentic in view of the academic credentials of the publisher and compiler. We have also examined an evaluation of VASCAR made for the Indiana State Police.

The consensus of these studies is that VASCAR is soundly engineered and that when properly used by an adequately trained operator over minimum distances of one-eighth to one-tenth of a mile VASCAR has a high degree of reliability in detecting the rate of speed of suspect motorists. From a parked position a minimum distance of 300 feet can be used. Average error is rarely found to exceed two miles per hour and usually is within a range of one and a half miles per hour or less.

Evidence Rule 9(2)(d) provides that judicial notice may be taken of "such facts as are so generally known or of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute"; also, under Rule 9(2)(e), judicial notice may be taken of "scientific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources of reasonably indisputable accuracy". And see *State v. Dantonio, supra* (taking judicial notice of the reliability of radar as a speed detection device); *State v. Johnson,* 42 *N. J.* 146, 170 (1964) (taking judicial notice of the reliability of the Harger Drunko-

meter); *State v. Arnwine,* 67 *N. J. Super.* 483 (App. Div. 1961) (refusing judicial notice of reliability of polygraph); *cf. State v. McDavitt,* 62 *N. J.* 36, 44 (1972).

We are satisfied from the evidence herein and the materials which have been adduced before us that VASCAR now meets the criteria of the rule for judicial notice. The absence of extensive scientific writings on the subject, such as preceded judicial notice of radar, for example, is not an inhibiting factor. This device does not embody any presently novel scientific principle. Instruments for the automatic measurement of time and distance have long been familiar to our technology. More recent, but not less firmly established, are the numerous practical applications of computer and calculator science using electronic equipment. VASCAR simply integrates all these now well-established techniques into a composite instrument. There is no reason whatever to doubt its practical efficacy for the designed purpose in the hands of a properly trained operator; and the manifold instances, as here and in the tests reported in the studies cited above, in which calibration has demonstrated beyond dispute the accuracy of particular VASCAR instruments, confirm that the device is reliable beyond any reasonable doubt.

The foregoing conclusions gain added support from the widespread satisfactory experience of police departments here and across the country with VASCAR. *Cf. State v. Dantonio, supra* (18 *N. J.* at 579); *State v. Andretta,* 61 *N. J.* 544, 549, 551 (1972) (police work with voiceprints).

In deciding to accord judicial notice to the reliability of the Harger Drunkometer the Supreme Court stated, in *State v. Johnson, supra* (42 *N. J.* at 171):

> "This conclusion cannot be affected by the fact that there are some, like defendant's witness in this case,

who dispute the precise accuracy of the device and that there is a possibility of error. Practically every new scientific discovery has its detractors and unbelievers, but neither unanimity of opinion nor universal infallibility is required for judicial acceptance of generally recognized matters."

Note also the caveat in *McCormick, Evidence* (1954) in discussing judicial notice, that the most frequent shortcoming of the courts in dealing with the doctrine is their failure "to employ the doctrine of judicial notice in this field [scientific and technological facts] to the full measure of its usefulness" (at 694).

Defendant challenges the use by this court of the data mentioned above on hearsay and due process grounds. In the latter regard he asserts he has been deprived of his rightful opportunity to confront and cross-examine the authors of the several reports mentioned. However, the very process of determination of whether grounds exist for the taking of judicial notice implies discretionary resort by the court to relevant authoritative literature in the particular field without any need for putting it through the adversarial trial process. See, *e.g.*, the extensive consultation of relevant literature in *State v. Dantonio, supra* (18 *N. J.* at 573, 575, 576, 578-79), where the court decided to take judicial notice of radar as a speed measurement device. *Evidence Rule* 10(2) provides that "In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) any source of relevant information may be consulted or used, whether or not furnished by a party, and (b) no rule of evidence except Rule 4 [discretionary exclusion of evidence whose probative value is outweighed by risk of undue consumption of time or undue prejudice] or a valid claim of privilege shall apply."

Copies of all the material considered by the court have been furnished to defendant, and he has employed the opportunity to attack its probative force as well as its admissibility. See *Evidence Rule* 10(1). It has been implicit that the court would have received from defendant any authoritative data disparaging the reliability of VASCAR. None has been received, nor does the court know of any. The contentions in respect of the hearsay rule and due process rights are without merit.

We find that the conviction of defendant in the county court of exceeding the speed limit is sustainable on the evidence adduced. In doing so, however, we point out that the factor of potential margin for error in VASCAR readings inherent in the intervention of the mental and physical processes of the operator of the device may well justify a court in declining to find guilt beyond a reasonable doubt where the reading is relatively close to the legal speed limit. But here there is no such problem in view of the wide disparity between the 55 m.p.h. limit and the 75.3 m.p.h. VASCAR reading. We also emphasize that in every future case there must be satisfactory proof of the good working order of the particular VASCAR instrument used and of the qualifications of the operator.

Affirmed; no costs on this appeal.

ORAL DECISION OF ATLANTIC COUNTY COURT.

(October 9, 1973.)

ATLANTIC COUNTY COURT LAW DIVISION
(CRIMINAL) ON APPEAL FROM
MUNICIPAL COURT.

STATE OF NEW JERSEY

v.

HAROLD FINKLE,

Defendant.

HON. MANUEL GREENBERG, JCC

[15]

Accordingly, I find that the defendant is guilty of the charge, and the same sentence will be imposed as was imposed in the municipal court below. And a fine of $20.00 and $10.00 costs and revocation of the driver's privileges in the State of New Jersey for a period of thirty days.

ORAL DECISION OF FOLSOM MUNICIPAL COURT.

MUNICIPAL COURT
FOLSOM BOROUGH
ATLANTIC COUNTY

July 23, 1973.

THE STATE OF NEW JERSEY,
Complainant,

v.

HAROLD FINKLE,
Defendant.

Magistrate THOMAS K. J. TUSO

[47]

MR. FINKLE: Well, I move to dismiss on the grounds that no proper foundation has been laid for the introduction of Vas-car testimony. As you know there has been no proof of the scientific accuracy of the instrument. Furthermore, there is some doubt as to when the element of distance was fed into the computer and thus the factors that I mentioned in the Schmeid case are not complied with.

THE COURT: Is that the end of motion?

MR. FINKLE: Yes.

THE COURT: Motion is denied on the basis that I believe that the trooper did lay a proper foundation and as I

have stated when you attempted to attack the use of Vas-car generally as a means for clocking speed that it was my ruling at that time that Vas-car had been accepted in the State of New Jersey and that the

[48]

use of Vas-car by the State Police for the purpose of making a determination as to the speed that vehicles travel on our state highways is accepted as a valid and accurate way of measuring speed.

Your motion is denied for those reasons.

MR. FINKLE: May I without appearing to be contumacious, may I ask your Honor and without being argumentive, when your Honor says that the Vas-car is accepted, you seem to me to be stating on the basis, on the fact that the State Police are using it and that the courts are accepting summonses on the basis of Vas-car. Am I correct in that? Is that the basis for the statement that it is accepted by the State of New Jersey?

THE COURT: No, sir, I am stating possibly that the word "acceptable" should be inserted in there, that it is an acceptable means of measuring speed and that is the meaning that I wished to place in that sentence. The state has determined that.

MR. FINKLE: Well, that is what troubles me when you said the state has determined it. I don't know of any authority.

THE COURT: Well, the case that you cited is some authority and I believe it is sufficient authority.

MR. FINKLE: All right. That is your ruling.

THE COURT: Anything further, sir?

[49]

MR. FINKLE: No, sir.

THE COURT: May I see the summons, please. Do you have a New Jersey driver's license? Do you want to separate your driver's license from the other documents, please?

Based on the entire testimony of the state trooper, which I will not repeat because we have now spent, I think, close to an hour and a half, if not in excess of that on this matter, I am entering a finding of guilty of traveling 75.3 miles an hour in a 55 mile zone. By the way, trooper, Mr. Finkle testified under oath that he was stopped in Gloucester County. Would that be Gloucester or Camden County?

* * *

(The intervening dialogue is not pertinent to the decision.)

[52]

THE COURT: I will impose a fine of $20.00 and costs of $10.00 and revocation of your driving privileges in the State of New Jersey for a period of 30 days.

CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTION OF UNITED STATES

5TH AMENDMENT.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

6TH AMENDMENT.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

14TH AMENDMENT.

SECTION 1.

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE I.

SECTION 10.

"1. No State shall . . . pass any bill of attainder, ex post facto law, . . ."

STATUTES INVOLVED.

TITLE 2A, NEW JERSEY STATUTES

CHAPTER 84A. RULES OF EVIDENCE.

Rule 9. Facts and Law Which Must or May Be Judicially Noticed.

(1) Judicial notice shall be taken, without request by a party, of the decisional, constitutional, and public statutory law and rules of court of this State and the decisional, constitutional, and public statutory law and rules of court of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken, without request by a party, of (a) the decisional, constitutional, and public statutory law and rules of court of every other state, territory and jurisdiction of the United States, private acts and resolutions of the Congress of the United States and of the legislature of this State, and of every other state, territory and jurisdiction of the United States, and duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State, and of every other state, territory and jurisdiction of the United States; (b) records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State; (c) the law of foreign countries; (d) such facts as are so generally known or of such common notoriety within

the area pertinent to the event that they cannot reasonably be the subject of dispute; and (e) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources of reasonably indisputable accuracy.

(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party notice thereof in the pleadings or at least 20 days before the trial. The judge, however, may permit such notice to be given at any time in the interest of justice. In the absence of an adequate basis for taking judicial notice of the law of any jurisdiction other than this State, and the United States, the judge shall apply the law of this State.

Rule 10. Determination as to Propriety of Judicial Notice and Tenor of Matter Noticed.

(1) The judge shall afford each party reasonable opportunity to present to him information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.

(2) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (a) any source of relevant information may be consulted or used, whether or not furnished by a party, and (b) no rule of evidence except Rule 4 or a valid claim of privilege shall apply.

(3) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince him that a matter falls within Rule 9, or

if it is insufficient to enable him to notice the matter judicially, he shall decline to take judicial notice thereof.

(4) The determination of the applicability and the tenor of any matter falling within Rule 9 shall be for the judge and not for the jury.

Rule 11. Instructing the Jury, Recording and Indicating Source of Matter Judicially Noticed.

On request the judge shall (a) instruct the trier of fact to accept a matter judicially noticed; (b) indicate for the record the matter noticed; and (c) indicate the source of his information.

Rule 12. Judicial Notice in Proceedings Subsequent to Trial.

(1) The failure or refusal of the judge to take judicial notice of a matter or to instruct the trier of fact with respect to it shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(2) The reviewing court in its discretion may take judicial notice of any matter specified in Rule 9, whether or not judicially noticed by the judge.

(3) A judge or a reviewing court taking judicial notice under paragraph (1) or (2) of this rule of matter not theretofore so noticed in the action may afford the parties opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1546

HAROLD FINKLE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Matter Involved

Pursuant to Supreme Court Rule 40-3, respondent, State of New Jersey, respectfully submits the following additions and corrections to petitioner's statement of the case.

Petitioner, Harold Finkle, was issued Summons No. H-92556 by State Police Trooper John C. Leach, charging him with speeding at 75.3 M.P.H. in a 55 M.P.H. zone on U.S. 322 westbound, on Saturday, May 5, 1973, at 8:30 p.m. A trial was held on July 23, 1973, in the Folsom Borough, Atlantic County, Municipal Court, with the Honorable Thomas K. J. Tuso, J.M.C., presiding. Petitioner appeared *pro se* and no attorney appeared on behalf of the Prosecution.

State Police Trooper John Leach testified that he had occasion to use a troop vehicle with a VASCAR ["visual average speed computer and recorder"] unit on May 5, 1973. The witness also testified that he was certified to operate the VASCAR (which meant that he had been qualified after receiving twenty-five hours of instructions and passing a series of twenty-five tests), that he calibrated the machine both before and after the incident in question (using a calibrated stop watch and a measured half-mile), and that he properly operated the machine at the time in question (T2-13 to T10-20). Overruling petitioner's objection, the court took judicial notice that VASCAR is scientifically accepted and therefore may be introduced as evidence. The court relied on the case of *State* v. *Schmiede,* 118 N. J. Super. 576, 289 A. 2d 281 (Cty. Ct. 1972), in which experts testified as to the scientific accuracy and reliability of VASCAR, and added that it puts an "intolerable burden" on the State to have expert witnesses testify at each hearing in order to lay a foundation for further testimony (T5-5 to 7; T8-20 to T9-8; T10-10 to 14). Petitioner took the stand in his own behalf and admitted that he had been speeding when he stated that if Trooper Leach had told him he was traveling at 60 M.P.H. he would have believed him, but he could not agree that he was going at a speed of 75 M.P.H. (T46-20 to 25). Petitioner's motion to dismiss "on the

grounds that no proper foundation [was] laid for the introduction of VASCAR testimony" was denied (T47-10 to T48-5). Petitioner was found guilty as charged (T49-24 to 25; Pa18 to Pa20).

On October 9, 1973, a trial *de novo* on the record was held in the Atlantic County Court, Criminal Law Division, with the Honorable Manuel Greenberg, J.C.C., presiding. Petitioner was represented by an attorney, who challenged the municipal court's taking of judicial notice of the accuracy of the VASCAR speedmeter (TA2). The court rejected this argument and stated that judicial notice was taken of the "accepted scientific principle" upon which the VASCAR is based: "that speed is nothing more than distance over time." (TA11-20 to 23; TA12-7 to 12). The court also noted that "all that the VASCAR does is change the ratio from one thousand yards per ten seconds to whatever miles are involved per hour. It's just making a change in the ratio." (TA13-1 to 4). Hence, "the only questions involved are, is it working properly, whether the person who was working it was qualified to do it, whether he went through the proper operation at the time in question?" (TA13-23 to TA14-2). The court ruled that since the record below established these factors, the State proved its case beyond a reasonable doubt. Therefore, the judgment of conviction in the municipal court was affirmed (TA14-12 to TA15-5; Pa17).

On October 26, 1973, petitioner duly filed his Notice of Appeal to the New Jersey Superior Court, Appellate Division. On March 4, 1974, argument was heard before the New Jersey Superior Court, Appellate Division. The respondent, State of New Jersey, argued that judicial notice of VASCAR's reliability and accuracy was properly taken at both the municipal court and county court levels. Based on *State* v. *Schmiede, supra,* the State maintained

that the municipal judge had simply taken judicial notice of the records of a state court which included expert opinion on the subject. N. J. Evid. Rule 9(2)(b). Based upon the simple scientific principle (one of "generalized knowledge") that speed equals distance over time, the county court judge properly ruled that judicial notice could be taken of the scientific principle underlying VASCAR. N. J. Evid. Rule 9(2)(e) (Pa22 to Pa23). In order to fully support its position, respondent also provided petitioner and the Appellate Court with numerous, published studies on the VASCAR. These included a 1968 evaluation by the Iowa Highway Patrol and a 1967 evaluation by the Michigan State Police, both of which found VASCAR to be "a valuable and accurate speed measuring device." Furthermore, in order to meet petitioner's challenge to the incidence and margin of error in the operator's management of a VASCAR device, respondent obtained two published studies by the University of North Carolina Highway Safety Research Center, which concluded that the incidence of error was less than one mile per hour. Walker, Council, Barry, Rouse, *An Evaluation of the Operational Efficiency of "VASCAR"—A Speed Measuring Device* (Chapel Hill, N. C.: University of North Carolina Highway Safety Research Center [NC HSRC], 1968); Council, *Retesting of VASCAR Operators: The Effect of a One-Year Period of Use,* (Chapel Hill, N.C.: NCHSRC 1969). These studies corroborated the information elicited from expert witnesses in *State* v. *Schmiede, supra; People* v. *Persons,* 60 Misc. 2d 803, 303 N. Y. S. 2d 728, 730 (Town Ct. 1969); and, *Tiffin* v. *Whitmer,* 320 Ohio Misc. 169, 290 N. E. 2d 198 (Mun. Ct. of Tiffin, 1970).

On May 6, 1974, the New Jersey Superior Court, Appellate Division, affirmed the conviction and upheld the

taking of judicial notice of the scientific accuracy and reliability of the VASCAR. *State* v. *Finkle,* 128 N. J. Super. 199, 319 A. 2d 733 (App. Div. 1974) (Pa5 to Pa16). See New Jersey Rules of Evidence, 9(2)(d), 9(2)(e), 10(1), 10(2), 12(1),(2) and (3) (Pa22 to Pa24). This decision was founded upon the lower courts' rulings, the information supplied by the State on appeal (which, contrary to petitioner's contentions, is subject to objective review by analyzing the various procedures and tests used in each report furnished to petitioner and the Court), and petitioner's failure to show—in any manner —that VASCAR's scientific accuracy and reliability may be refuted.

The New Jersey Supreme Court granted certification, 65 N. J. 575 (1974), and argument was heard on November 18, 1974. The Court granted respondent's motion to enlarge the record so as to include questionnaires completed by the authors of the various reports and studies, which questionnaires were offered to refute petitioner's allegation that the reports were not independently published (Pa3). On December 4, 1974, the New Jersey Supreme Court affirmed petitioner's conviction "substantially for the reasons expressed by the Appellate Division." *State* v. *Finkle,* 66 N.J. 139, 329 A.2d 65 (1974) (Pa2). On January 14, 1975, the Court denied petitioner's motion for a rehearing (Pa4).

Petitioner now claims that he was denied Due Process under the Fifth and Fourteenth Amendments of the United States Constitution. He also claims a denial of his right to confrontation under the Sixth Amendment, and alleges a violation of the prohibitions against *ex post facto* enactments as guaranteed by Article I, section 10, clause 1. Respondent respectfully submits that these contentions of alleged constitutional infringements are without merit or substance and do not warrant review by this Court.

Reasons for Denying Certiorari

It is petitioner's main contention that he has been denied Due Process, under the Fifth and Fourteenth Amendments, and that his convictions in both the municipal and county courts of New Jersey were therefore improper. He does not challenge the validity of the New Jersey Rules of Evidence, but instead attempts to disparage the manner in which they were applied.

Respondent respectfully submits that petitioner fails to allege any "special and important reasons" to support his petition for review on writ of certiori. 28 U.S.C. Supreme Court Rule 19. The New Jersey Courts have not decided "a federal question of substance not [heretofore] determined by this Court." *Ibid.* Nor does petitioner sustain his arguments by showing that the New Jersey Courts have decided the matter at hand in disaccord with applicable decisions of this Court. *Ibid.*

In order to refute petitioner's allegations, respondent will trace the proceedings below from their inception. This method of argument is deemed necessary so as to illustrate that at every stage of the proceedings petitioner was not denied his day in court on the issue of VASCAR's scientific reliability and accuracy. As the record amply proves, no constitutional errors were manifested at any point. Furthermore, petitioner fails to substantiate any contention which would warrant review by this Court.

It is respondent's position that in every possible instance petitioner has been given proper notice and a full opportunity to be heard. The traffic summons initially issued to petitioner served as notice, since under New Jersey Court Rule 7:6-1, a traffic ticket is deemed to be both a complaint and summons. Upon this same ticket

it was indicated that VASCAR was used by the State Police Trooper.

In the municipal court, the judge indicated that the prosecution was not being required to present formal evidence on the question of VASCAR's general scientific accuracy and reliability. Over petitioner's objection, judicial notice was thus taken of the accuracy of VASCAR. In so doing, the court made explicit reference to the reported case of *State* v. *Schmiede, supra,* in which an expert witness from the manufacturer testified as to the machinations of the VASCAR. It is respectfully submitted that the municipal court properly took judicial notice pursuant to N. J. Evid. Rule 9(2)(b), which allows one court to notice the records of another court in the State. The other ground upon which the municipal court judge ruled was his own familiarization with VASCAR. This was valid under N. J. Evid. Rule 10(2), which permits a court to use "any source of relevant information." However, respondent is cognizant of the fact that this could not have been the sole basis for taking judicial notice unless the fact judicially noticed was also one of "common notoriety" or "generalized knowledge." In any event, the court noted the overriding consideration of judicial efficiency and administration when it commented that additional expert testimony on the subject would be time consuming and burdensome. Thus, one of the major objectives of judicial notice was recognized as a primary factor in the court's decision not to require expert testimony. See *Ohio Bell Telephone* v. *Public Utilities Commission,* 301 U. S. 292 (1937); *N. J. Supreme Court Committee on Evidence* (1963), Comment on Rule 9, at p. 28.

A *prima facie* case was adduced when State Police Trooper Leach testified that he was certified to operate

the VASCAR device, the specific VASCAR unit was calibrated (before and after the incident), and he operated the unit correctly at the time in question. See, *e.g., State* v. *Dantonio,* 18 N. J. 570, 579-580, 115 A. 2d 35 (1955) (radar); *State* v. *Schmiede, supra* at 580-581; *People* v. *Persons, supra* at 731; *State* v. *Greul,* 291 Minn. 361, 191 N. W. 2d 428 (1972) (radar); *Everight* v. *City of Little Rock,* 230 Ark. 695, 326 S. W. 2d 796 (1959) (radar).

After the trial *de novo* on the record, petitioner was found guilty of speeding and his conviction was thereby affirmed. Here again, petitioner was on notice that the VASCAR was in issue as the instrument used to detect his speeding infraction. Petitioner presented no argument to allay the county court's decision to take judicial notice of VASCAR's reliability and accuracy. The county court relied upon N. J. Evid. Rule 9(2)(d) or (e), which permits judicial notice to be taken of facts of "common notoriety" or of facts of "generalized knowledge" through resort to sources of reasonably indisputable accuracy. Basically, the court looked to the principle underlying VASCAR, *i.e.,* that velocity (or speed) is nothing more than distance divided by time. Since VASCAR is fundamentally a computer which electronically performs this function, the court ruled that VASCAR was "ripe" for judicial notice.

The county court noted that the record at trial "indicates that the officer had training, had sufficient training in this device to operate it; he tested the machine . . . both before and after the incident in question, and it was found to be accurate; . . . it was established that the machine was properly operated at the time in question." (TA14-12 to 21). Based on these findings, respondent respectfully submits that a *prima facie* case of speeding was proven beyond a reasonable doubt. There is ample

case law to support a conviction based on the reading of a speedmeter, such as VASCAR. *State* v. *Dantonio, supra* at 580, citing *Penny* v. *Nicholas,* 2 K.B. 466, All Eng. 89 (1950); *Cf., People* v. *Blattman,* 50 Misc. 2d 606, 270 N.Y.S.2d 903 (Cty.Ct. 1966); 21 *A.L.R.*2d 1200.[1] Moreover, the acceptance of the results of such checks as *prima facie* evidence of the speed of a motor vehicle does not violate the due process clause of the Federal Constitution, since the burden of proof is not shifted, but merely presents a rule of evidence without determining the guilt of the accused. *Dooley* v. *Commonwealth,* 198 Va. 32, 92 S.E.2d 348 (1956).

Thus it is respectfully argued that petitioner was in no way denied his day in court. Rather, he was put on notice and failed to dislodge either of the courts from their determinations that the time had come for taking judicial notice of VASCAR's scientific accuracy and reliability. Petitioner's argument that he could not confront any expert witnesses completely ignores the basic reason for judicial notice. That is, to alleviate the formal presentation of evidence on a given subject. This, in turn, avoids unnecessary wastes of time and money. See *Ohio Bell Telephone* v. *Public Utilities Commission, supra.* Nor may petitioner now contend that he could have refuted such expert testimony, since he failed to establish in either of the lower courts that VASCAR is unreliable. Therefore, given ample opportunity to challenge the accuracy of the device before and during both of the lower proceedings, petitioner may not allege a denial of due process.

Petitioner again attempted to question the propriety of the taking of judicial notice in the New Jersey Superior

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[1] Also, petitioner admitted he was speeding (T46-20 to 25).

Court, Appellate Division,[2] and the New Jersey Supreme Court. Besides supporting the lower court decisions, respondent sought to present additional, relevant material on VASCAR. Outside studies were referred to in respondent's appellate brief, and copies of these references were given to petitioner and the Court. They are now part of the record. Accordingly, under *N.J.Evid.* 10(2) and 12(1)(2) and (3), the Appellate Division was well within its bounds to take judicial notice of VASCAR's reliability even if the lower courts had not (Pa22 to Pa24).

Succinctly stated, it was respondent's position that the question of VASCAR's scientific accuracy could not be viewed in a vacuum. While there were substantial grounds to support the municipal and county courts' rulings under *N.J.Evid. Rule* 9(2), the need for more information was deemed appropriate and necessary. This is especially true when it is understood that VASCAR's operation does include an human element. Respondent located independent studies which found VASCAR to be reliable and accurate. Moreover, the question of depth perception and reaction time of the operator were both found to be of minimal effect on the proper operation of a VASCAR unit. Barefoot, *Evaluation of VASCAR as a Speed Measuring Device For Highway Patrol* (Raleigh, N.C.: North Carolina Highway Patrol, undated); Dykeman, *Evaluation of VASCAR* (Iowa Highway Patrol, 1968); IIT Research Institute, *The Evaluation of VASCAR* (Chicago, Ill., 1970); Maciejewski, *Evaluation*

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[2] It is submitted that while the Appellate Division simultaneously decided the case of *State* v. *Salup*, 128 N. J. Super. 209, 319 A. 2d 739 (App. Div. 1974), there is absolutely no indication that this case—which also involved VASCAR—was determinative in reaching an opinion in the case at hand.

of "VASCAR" (Michigaan State Police, 1967); Nossett and Burlison, *Evaluation of a Device for Checking the Speed of a Moving Automobile Vehicle* (Indiana State Police, 1966); Onderko, *Evaluation of a Device for Checking and Recording the Speed of a Moving Automotive Vehicle* (Phila., Pa.: The Franklin Institute, 1960); Walker, Council, Barry and Rouse, *An Evaluation of the Operational Efficiency of "VASCAR"—A Speed Measuring Device* (Chapel Hill, N.C.: The University of North Carolina Highway Safety Research Center, 1968); Council, *Retesting of VASCAR Operators: The Effect of a One-Year Period of Use* (Chapel Hill, N.C.: NCHSRC, 1969).[3] These outside sources substantially corroborated the expert testimony elicited in *State v. Schmiede, supra,* and the two reported cases from New York (*People* v. *Persons, supra*) and Ohio (*Tiffin* v. *Whitmer, supra.*) Most importantly, this information exemplified the scientific community's uniformity of opinion that VASCAR is indeed reliable and accurate.

It is respectfully submitted that these outside reports were properly considered by the Appellate Division and the New Jersey Supreme Court. Both courts on appeal could take judicial notice pursuant to *N.J. Evid. Rule* 12. Most importantly, "it is to be noted that *Rule* 12(3) is subject to *Rule* 10(2), which provides that the court may consult and use any pertinent information and that, except for a valid claim of privilege, evidence rules do not apply." *N.J. Supreme Court Committee on Evidence* (1963), *supra* at p. 43. Therefore, petitioner mistakenly bases his attack on these materials by calling them "hearsay." His parochial view of the reliability of these out-

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[3] These studies were all reprinted in a New Jersey Institute of Continuing Legal Education publication, *Understanding the Breathalyzer, VASCAR and Radar, Part II* (Rutgers University 1974).

side sources is grounded upon the fact that he could not find them on a library shelf. In contradistinction, it has been respondent's position throughout the appellate process that the outside reports and studies are independently reliable. This is to say, one need only consider the testing methods and the manner of obtaining the results in order to ascertain the validity of these studies (both scientifically and statistically).

Respondent furthermore asserts that petitioner was not deprived of any right to confrontation as to these materials; first, because they are not subject to the New Jersey evidence rules relating to hearsay, and second, because they may be subjected to objective, scientific scrutiny. For example, petitioner might have shown some bias in the testing procedures, some error in the formulae used, or some lack of logic or reasoning in the conclusions reached. However, it is apparent that petitioner would rather claim what he labels as "constitutional infringements" than present any arguments (or other data) which might tend to question the results of these studies.

Petitioner contends that there has been some sort of prejudgment or bias on the part of the New Jersey Courts in this matter. Such a claim flies in the face of reason and ignores the New Jersey Rules of Evidence. For instance, petitioner contends that the outside studies were unauthenticated and unauthoritative. Pursuant to *N.J.Evid. Rules* 10(2) and 12(1), (2) and (3), respondent obtained affidavits from the various authors as to why their studies were undertaken, whether it was independent, and why their results may be considered valid. These were made part of the record pursuant to a motion to enlarge the record. Although petitioner had his day in court—actually two days: before the Appellate

Division and before the New Jersey Supreme Court—he chose not to attack the merits of these reports and merely insisted that they were improperly being made a part of the record. As explained above, these reports were correctly considered under *N.J.Evid. Rules* 10(2) and 12. Hence, it is respectfully submitted that at no stage of the proceedings was petitioner denied due process of law.

Finally, petitioner's contention that there has been a violation of the prohibition against *ex post facto* enactments is spurious. The prohibition against *ex post facto* laws operates as a restraint on legislative power; it does not apply to changes affected by judicial decision. *Ross* v. *Oregon,* 227 U.S. 150 (1913). Furthermore, the New Jersey Courts did not change any rule of evidence since the same evidence is still required to prove a *prima facie* case of speeding. See, *Calder* v. *Bull,* 3 Dall. 386 (1798).

CONCLUSION

It is respectfully submitted that the petitioner has failed to substantiate any claim of constitutional error in the New Jersey Courts. Petitioner was on notice and had several opportunities to be heard on the taking of judicial notice of the scientific accuracy and reliability of VASCAR. The Courts involved in this matter acted pursuant to N. J. Evid. Rules 9, 10 and 12. Therefore, for all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this Court not issue.

Respectfully submitted,

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Attorney for Respondent
By: ROBERT A. RUBENFELD

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1546.

HAROLD FINKLE,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey.

REPLY BRIEF OF PETITIONER.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

Because Respondent's brief makes some seriously false statements and misleading implications we are obliged to refute and comment. To assist the Court in discerning the State's inaccurate conclusions as to the trial proceedings, we have lodged with the Clerk of the Court a copy of the Trial Transcript which is part of the Record below.

For example, at **Rb2**, the State says that the Magistrate "took judicial notice." That is absolutely untrue. The following colloquy took place at page 3 of the Transcript:

> "MR. FINKLE: May I ask your Honor the basis on which the court takes judicial notice of the accuracy of Vascar.
>
> THE COURT: Of the accuracy of Vascar?
>
> MR. FINKLE: I assume you are taking judicial notice of the accuracy.
>
> THE COURT: Well, I don't know whether you can characterize it as taking judicial notice. I had had the occasion to be instructed in the operation of Vascar by the New Jersey State Police at the Port Norris Barracks. I have had occasion to—
>
> MR. FINKLE: Is your Honor testifying as an expert?
>
> THE COURT: No, I am telling you my basis for the permitting the introduction of testimony of Vascar. I have had demonstrations of Vascar. . . ."

Again at **Rb2** the State says that Petitioner "admitted he had been speeding." That is false. The exact testimony was, at page 46 of the Transcript:

> "When the tropper stopped me, I said—and he told me that I had been going 75 miles an hour, I said to him, "that you must be out of your mind. If you had said to me I was going 60 miles an hour I would believe you, but to tell me I was going 75 miles an hour in this traffic," I said, "you have to be crazy." He said, "well, it is on my Vascar unit." I told him, "I don't care about your Vascar unit. I can't be going 75 miles an hour."

Neither the Magistrate, the County Court nor the Appellate Division held this to be an admission of guilt. When this was referred to at oral argument in the Supreme Court of New Jersey, the Justices recognized it for exactly what it was—an argumentative, conjectural statement; not an admission of guilt.

At **Rb4** the Attorney General of New Jersey is deliberately misleading this Court when he says that the State "provided . . . numerous, published studies on Vascar." He knows very well that this was not "published" material as that word is generally understood and as defined in every dictionary; and that it had not theretofore been publicly disseminated or submitted to any court. (See our footnote #6, page 9 of the Petition).

At **Rb5 line 5**, the reference to New Jersey Evidence Rule 12 is again a false implication. The Appellate Division did not even refer to nor base its decision upon Rule 12, which is precisely the point of our contention of error.

RESPONDENT'S ARGUMENT

The thrust of Respondent's argument for denying the Petition seems to be that the Petitioner had "proper notice" that the charge was based upon Vascar, ergo he had "full opportunity" to dispute the merits (or more particularly the "reliability and accuracy") of Vascar, and "failed to establish that it is unreliable". It is difficult to understand such distorted reasoning in the context of a criminal case with its burden-of-proof requirement. Furthermore, the Attorney General knows very well (as we have shown below) that there is not even any discussion of Vascar in any scientfic or engineering or technical journal, manual or other published reference book. Which brings attention to the preposterous statement at **Rb11 line 18** that "this information exemplified the scientific community's uniformity of opinion." We wonder that the Attorney General feels no embarrassment in calling this collection of obscurity—"*the scientific community*".

This, itself, emphasizes the need for confrontation. The denial of this constitutional right would allow a conviction to stand on unauthenticated materials allegedly authored by persons whose credentials are unverified and untested. We submit that it is presumptuous and deliberately misleading to even list these papers in Respondent's Table of Contents under the heading of "Other Authorities Cited". And the Respondent says that *our* view is "parochial" because we cannot find these papers "on a library shelf".

At **Rb12,** middle of last paragraph, there is a blatant falsehood. The Attorney General says ". . . respondent obtained affidavits from the various authors. . .". *These were not affidavits;* they were the "questionnaire" described on page 13 of the Petition. They were not even signed. We are amazed at this continuing reckless insen-

sitivity. It typifies the desperation, evident throughout this case, to achieve judicial-notice recognition for this speed-meter device regardless of propriety.

The rest of **Rb12** and the first paragraph on 13 are simply begging the question on the basic point that this dubious material, together with the other papers submitted to the Appellate Division, were an improper basis for *judicial notice by an Appellate Court.* The Attorney General persists in referring indiscriminately to Evidence Rules 10 and 12 without making any distinction, and fails to meet our contention that the Appellate Division *improperly* invoked Rule 10, that it made no mention whatsoever of Rule 12, and if it, or the Supreme Court, did rely on Rule 12 (and there is no such indication) then the decisions are certainly in error because the *"any source"* provision in Rule 10 is purposefully omitted from Rule 12.

The Attorney General still fails to perceive that the issue in this case is *not* the merits of Vascar. The real issue is the manner in which the Law and Rules of Evidence have been applied to this defendant in this case—Due Process and Confrontation.

With respect to the *Ex Post Facto* question, the Respondent's references are not entirely in point, and certainly not in accord with a philosophy of the law that has only gained recognition in recent years. That embraces the theory of "judicial legislation" espoused (among others) by the Honorable Joseph Weintraub, former Chief Justice of New Jersey Supreme Court, in *Judicial Legislation,* 81 N. J. L. J. 545 (1958); and the theory of judicial notice which distinguishes between "adjudicative facts" and "legislative facts." The former is too controversial and not relevant for discussion at this point; but the latter (so ably expounded in the extensive writings of Professor Kenneth Culp Davis and others) is a universally established

concept. In recognition, the Federal Rules of Evidence restrict judicial notice to "adjudicative facts" (Rule 201(a)).

Therefore when a state court now purports to take judicial notice of a "legislative fact" it is exercising a legislative function. In this case it was the Appellate Division which first did so. The error was in its "retrospective operation", which is the phrase used in *Calder v. Bull*, 3 Dall. 386, 390. And our contention is not inconsistent with Justice Chase's definition:

> "I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. * * * * 4th. Every law that alters the legal rules of evidence, *and receives less, or different testimony, than the law required at the time of the commission of the offence*, in order to convict the offender." (emphasis added).

Respectfully submitted,

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